IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1253 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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LAKHUBHAI AAPABHAI KHACHAR & 1 - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR ZUBIN F BHARDA for Applicant(s) : 1 - 2.
MR RC KODEKAR, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
None for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 19/10/2007

ORAL JUDGMENT

1. Present petition is filed by the petitioners – original accused Nos. 1 and 3 under Articles 226 and 227 of the Constitution of India for an

appropriate order to quash and set aside the order dated 15.06.2007 passed by the learned Additional Sessions Judge, 4th Fast Track Court, Bhavnagar, Camp-Botad, allowing Exh.14 application and ordering further investigation of Sessions Case No.222 of 2006 by C.I.D., Crime Branch of Bhavnagar District.

2. The petitioners and another are charge-sheeted for the offence under Section 302 read with Section 34 of the Indian Penal Code, Section 135 of the Bombay Police Act and Section 25(1) of the Arms Act for the offence alleged to have happened on 15.05.2006. Said complaint was registered as FIR being C.R.No.I-30 of 2006 with Paliyad Police Station. The said complaint was investigated by the Police Officer of said Police Station and charge-sheet came to be filed by the concerned Investigating Officer. That thereafter, the case was committed to the learned Sessions Judge, Bhavnagar, and it was numbered as Sessions Case No.222 of 2006. That thereafter, the complainant submitted application below Exh.14 in the said Sessions Case for further investigation by the independent agency like C.I.D.

Crime apprehending that the concerned Investigating Officer has not investigated the crime in fair manner and that investigation has been conducted so as to help the accused persons. It was submitted that concerned Investigating Officer helped the accused persons while recovering 'Dhariya' which was used in committing offence. Similarly, he has even not send weapons /'Dhariya' which used in committing the offence to the F.S.L. and even there is further irregularities and/or concerned Investigating Officer has acted in doubtful manner and impartial manner in sending *Muddamal* and blood sample to the F.S.L. and that concerned Investigating Officer has not even thoroughly investigated the crime. Therefore, it was requested for further investigation under Section 173(8) of the Criminal Procedure Code ('***Cr.P.C.***' for short) by further directing CID, Crime to further investigate the crime. Learned Public Prosecutor supported the application and he also submitted that independent investigation is also required. Even learned Public Prosecutor was of the opinion that concerned Investigating Officer has not independently and fairly investigated the case and on going through

the police papers it appears that investigation has been carried and charge-sheet has been filed with a view to help accused persons. He has further submitted that on the basis of the same if the trial is proceeded further same will not be justifiable and/or in the interest of justice.

The application was opposed by the learned Advocate appearing on behalf of the accused persons by submitting that the application for further investigation under Section 173(8) of the Cr.P.C. at the instance of the complainant is not maintainable and that even once cognizance is taken by the learned Magistrate and/or the Court, even the application for further investigation / re-investigation under Section 173(8) of the Cr.P.C. is not maintainable. That the learned Additional Sessions Judge, 4th Fast Track Court, Bhavnagar, Camp – Botad by his impugned order dated 15.06.2007 allowed the said application Exh.14 and directed CID, Crime Branch, Bhavnagar District to investigate the case under Section 173(8) of the Cr.P.C. and to submit the report and; that after receipt of the said report further proceedings

of Sessions Case would be proceeded further. Being aggrieved and dissatisfied with the order dated 15.06.2007 passed below Exh.14 in allowing the application of the complainant for further investigation under Section 173(8) of the Cr.P.C., the petitioners – original accused Nos. 1 and 3 have preferred the present petition under Articles 226 and 227 of the Constitution of India.

3. Mr.Bharda, learned Advocate appearing on behalf of the petitioners – original accused has vehemently submitted that impugned order passed by the learned trial Court in allowing application Exh.14 and ordering further investigation under Section 173(8) of the Cr.P.C. is absolutely illegal and contrary to the provisions of the Cr.P.C. It is submitted that the learned trial Judge has grossly erred in entertaining the application for further investigation filed by the complainant at a belated stage and practically after one year of registration of the alleged offence. It is submitted that such an application at the behest of the complainant is not maintainable as under Section 173(8) of the Cr.P.C.,

it is the Investigating Officer who is vested with power and/or authority to pray for further investigation. It is also submitted by Mr.Bharda, learned Advocate that once final report made by the concerned Investigating Officer is already filed and accepted by the learned Magistrate in form of charge-sheet, order of further investigation could not have been passed by the learned Judge. Mr.Bharda, learned Advocate has relied upon the decision of the learned Single Judge of this Court in the case of ***Miteshkumar Rameshbhai Patel & Anr. V/s. State of Gujarat & Anr.*** reported in *2006 (3) GLR 1935*, in support of his submission that the Court cannot, after cognizance is taken, direct further investigation by police. Under the circumstances, it is submitted that the order passed by the learned trial Court is without jurisdiction and same requires to be quashed and set aside.

4. On the other hand, the application is opposed by Mr.Kodekar, learned Additional Public Prosecutor and has submitted that in the facts and circumstances of the case and to do substantial

justice, when the learned trial Court was of the opinion that investigation was defective and to find out the real truth, if further investigation is ordered by the independent agency, same cannot be said to be bad in law and/or illegal. It is submitted that even as held by the Hon'ble Supreme Court in the case of ***Hasanbhai Valibhai Qureshi v/s. State of Gujarat and ors.*** reported in *AIR 2004 SC 2078*, further investigation is not ruled out merely on ground that it may delay trial. Even after Court takes cognizance of offence on earlier report submitted by police, it is open to police to conduct further investigation in a proper manner. He has also relied upon the decision of the Hon'ble Supreme Court in the case of ***Zahira Habibulla Sheikh and Anr. v/s. State of Gujarat and Ors.*** reported in *(2004) 4 SCC 158* and has submitted that when it is brought to the notice of the Court / Magistrate that investigation has not been carried by the concerned Investigating Officer in fair manner and investigation has been conducted with a view to help the accused persons, in that case, it is the duty of the learned Magistrate and/or Court to order further

investigation and that too by the independent agency so as to find out truth and to do complete justice and technicalities will not come in the way of the learned Magistrate in passing the order to find out the truth. He has further submitted that anybody inclusive of the complainant can brought to the notice of learned Magistrate / Court glaring defects in the investigation and pray for further investigation. Therefore, it is submitted that if there is further investigation by the independent agency, no prejudice is likely to be caused to the accused persons and therefore, it is requested to dismiss the present application.

5. Heard the learned Advocates appearing on behalf of the respective parties.

6. At the outset, it is required to be noted that the petitioners are charged for the offence under Sections 302 and 34 of the I.P.C., Section 135 of the Bombay Police Act and Section 25(1) of the Arms Act. After investigation of the complaint, charge-sheet was submitted and on considering the

police papers the complainant felt and apprehended that the investigation of the case has not been carried out by the concerned Investigating Officer in fair and impartial manner and therefore, he submitted application Exh.14 requesting the learned Additional Sessions Judge for ordering further investigation under Section 173(8) of the Cr.P.C. and that too by independent investigating agency like C.I.D., Crime. Said application came to be supported by the learned Public Prosecutor. Considering the record and after hearing the learned Advocates appearing on behalf of the respective parties, learned Additional Sessions Judge came to the conclusion that the Investigating Officer has not conducted investigation in fair manner and in right direction. It is established on record that investigation is not conducted in fair and impartial manner. Learned Additional Sessions Judge also came to the conclusion that with a view to find out truth, further investigation is required and for which the learned Additional Sessions Judge has given cogent reasons. Therefore, to do substantial justice and find out truth, learned Additional Sessions Judge has allowed the application below

Exh.14 ordering further investigation under Section 173(8) of the Cr.P.C. by independent investigating agency like C.I.D., Crime Branch, Bhavnagar District.

In the case of ***Zahira Habibulla (supra)***, the Hon'ble Supreme Court has observed '*Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield itself or its men. It should be ensured that they do not wield such powers, which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies, Courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice.*' It is also further observed by the Hon'ble Supreme Court that '*Section 173(8) Cr.P.C. permits further investigation, and even dehors any direction*

from the Court as such it is open to the police to conduct proper investigation even after the Court has taken cognizance of any offence on the strength of a police report submitted earlier. It is also observed by the Hon'ble Supreme Court that '*a criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine, by becoming participant in the trial evincing intelligence, active interest and eliciting all relevant materials necessary for reaching the*

correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to the proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.'

7. Now considering the facts of the case on hand and the observation made by the Hon'ble Supreme Court in the aforesaid decision and observation made by the learned Additional Sessions Judge while allowing the application for further investigation, it appears that the learned Additional Sessions Judge was satisfied that the Investigating Officer has not conducted the investigation in fair and impartial manner and in right direction and therefore, further investigation by independent agency is required. Considering above, when the learned Additional Sessions Judge has passed an order for further investigation, it cannot be said that the learned

Additional Sessions Judge has committed any error. Now so far as the contention on behalf of the petitioners – original accused that the learned Additional Sessions Judge ought not to have ordered for further investigation on the application submitted by the complainant and under Section 173(8)of the Cr.P.C., only concerned Investigating Officer and/or police is vested with the power for further investigation with the leave of the Court is concerned, it is required to be noted that as observed by the learned Additional Sessions Judge the concerned Investigating Officer has not conducted investigation in fair and impartial manner and/or in right direction, carried out the investigation, filed charge-sheet so as to help the accused persons. Therefore, it is not expected that the concerned Investigating Officer and/or police would submit application for further investigation. Even otherwise, it is required to be noted that any crime is against the society. Every citizen is interested in seeing that real accused persons who have committed the crime are punished. Similarly, the complainant will be most affected and vitally

interested person in seeing that the real accused persons are booked and convicted. Therefore, when the complainant approached the concerned Court before whom trial is pending making out a grievance and/or arriving that investigation so far carried out has not been conducted in fair manner and impartial manner and was not in right direction and charge-sheet has been filed, to find out the truth the complainant has approached the learned trial Court and on the basis of the said application, if the learned trial Court is satisfied with regard to further investigation, it cannot be said that learned trial Court has committed any error and/or the complainant has no locus to submit the application for further investigation. Anybody can move the learned trial Court and if the learned Magistrate/ trial Court is satisfied that investigation was faulty and not in right direction and/or in fair manner, the learned Magistrate can pass an order for further investigation under Section 173(8) of the Cr.P.C. Even as observed by the Hon'ble Supreme Court in the case of ***Zahira(supra)***, in that circumstances, it will be bounded duty of the learned

Magistrate and/or learned trial Court to pass an order for further investigation and he cannot be mute spectator. Under the circumstances, it cannot be said that the learned trial Judge has committed any error in ordering further investigation.

8. Now so far as the decision of the learned Single Judge of this Court in the case of ***Miteshkumar Rameshbhai Patel (supra)*** relied upon by the petitioners is concerned, same would not be applicable in as much as in the present case trial has not proceeded further. In the case before the learned Single Judge, trial was already proceeded further and even otherwise considering the decision of the Hon'ble Supreme Court in the case of ***Zahira (supra)***, findings of the learned Additional Sessions Judge, decision of the learned Single Judge relied upon by the petitioners would not be any assistance to the petitioners. Even considering the decision of the Hon'ble Supreme Court in the case of ***Zahira (supra)***, it cannot be said that the learned Additional Sessions Judge has committed any error in allowing application Exh.14. It is required to be

noted that if further investigation is carried out by the independent agency like C.I.D., Crime Branch, Bhavnagar, no prejudice will be caused to the accused persons as further investigation is ordered to find out truth and to do substantial justice and to see that real accused persons are convicted. Under the circumstances, it cannot be said that the learned Additional Sessions Judge has committed any error in ordering further investigation by independent agency like C.I.D., Crime.

9. For the reasons stated above, the petition deserves dismissal and is accordingly dismissed.

[M.R.Shah, J.]

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